PRODUCT LIABILITY/Punitive Damage Limits

SUBJECT: **Product Liability Fairness Act . . . H.R. 956. Dole modified amendment No. 617 to the Gorton substitute amendment No. 596.**

ACTION: AMENDMENT AGREED TO, 51-49

SYNOPSIS: As passed by the House, H.R. 956, the Product Liability Fairness Act, will establish uniform Federal and State civil litigation standards for product liability cases and other civil cases, including medical malpractice actions.

The Gorton substitute amendment would apply only to Federal and State civil product liability cases. It would abolish the doctrine of joint liability for noneconomic damages, would create a consistent standard for the award of punitive damages and would limit such damages, and would encourage the adoption of alternative dispute resolution mechanisms.

The Dole modified amendment would bar the award of punitive damages in any Federal or State civil action the subject matter of which affected commerce unless the claimant could establish by clear and convincing evidence that the harm was the result of conduct by the defendant that was either specifically intended to cause harm or was carried out with conscious, flagrant disregard to the rights or safety of others. Punitive awards would not exceed 2 times the sum of the awards for economic and noneconomic losses. At the request of any party, the trier of fact would conduct a separate proceeding to determine if punitive damages should be awarded. If a separate proceeding were held, evidence relevant only to the claim of punitive damages, as determined by applicable State law, would be inadmissable in any proceeding to determine whether to award compensatory damages.

Those favoring the Dole amendment contended:

The bill before us will limit punitive damages in product liability cases to the greater of $250,000 or three times economic losses. The Dole amendment would make two changes to this limit. First, it would change the limit to two times compensatory losses (economic and noneconomic losses). This limit would match the limit set on punitive damage awards in medical malpractice cases that the Senate approved on the Snowe amendment. The purpose of this change, which a strong majority of the Senate supported on

(See other side)

YEAS (51)

Republicans (47 or 87%)		Democrats (4 or 9%)
Abraham	Hatfield	Exon
Ashcroft	Helms	Kerrey
Bennett	Hutchison	Lieberman
Bond	Inhofe	Nunn
Brown	Jeffords	
Burns	Kassebaum	
Campbell	Kempthorne	
Chafee	Kyl	
Coats	Lott	
Cochran	Lugar	
Coverdell	Mack	
Craig	McCain	
DeWine	McConnell	
Dole	Murkowski	
Domenici	Nickles	
Faircloth	Pressler	
Frist	Santorum	
Gorton	Simpson	
Gramm	Smith	
Grams	Snowe	
Grassley	Stevens	
Gregg	Thomas	
Hatch	Thurmond	
	Warner	

NAYS (49)

Republicans (7 or 13%)	Democrats (42 or 91%)	
Cohen	Akaka	Hollings
D'Amato	Baucus	Inouye
Packwood	Biden	Johnston
Roth	Bingaman	Kennedy
Shelby	Boxer	Kerry
Specter	Bradley	Kohl
Thompson	Breaux	Lautenberg
	Bryan	Leahy
	Bumpers	Levin
	Byrd	Mikulski
	Conrad	Moseley-Braun
	Daschle	Moynihan
	Dodd	Murray
	Dorgan	Pell
	Feingold	Pryor
	Feinstein	Reid
	Ford	Robb
	Glenn	Rockefeller
	Graham	Sarbanes
	Harkin	Simon
	Heflin	Wellstone

NOT VOTING (0)

Republicans (0)	Democrats (0)

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

the Snowe amendment, is to make sure we do not, in effect, base punitive judgments on the wealth of the plaintiffs (wealthy plaintiffs generally have higher economic losses, and thus under the bill's formulation will have generally higher limits; noneconomic losses, on the other hand, are not related to the wealth of the plaintiffs).

The second change that would be made by the Dole amendment is more controversial. That change would be to extend the limit to cover all Federal and State civil punitive damage awards. Manufacturers and doctors are not the only ones who need protection from rapacious lawyers--small businesses, volunteer organizations, and local governments also are in desperate need of relief. Considering that the constitutionality of damage awards in civil cases in any event is questionable, this limit is very modest. Senators who object to this extension are generally the same Senators who object to placing the punitive damage cap on product liability cases. Their objections in both cases are not well grounded in the facts. Abuses exist and they should be curtailed.

Over the past several days, some Senators have been fond of repeating that product liability cases comprise only a small portion of all civil tort cases. The logic seems to be that fixing problems in this area are not worth our time because they do not embrace the entire system. We emphatically reject the notion that product liability tort reform is too small a subject for our consideration, but we enthusiastically agree with the implicit suggestion in our colleagues' argument that we should expand the scope of this bill. Therefore, we are pleased to extend the punitive damages cap to all civil filings, which will provide much needed relief to volunteer organizations, small businesses, and governments.

Some of the civil awards that have been given are simply mindboggling. For example, a $4.3 million award was made to a convicted felon who, in the course of violently robbing a 72-year-old subway passenger, was shot and paralyzed by a transit authority police officer (*McCummings* v. *New York City Transit Authority*). Such awards are so common in New York City that it annually spends more on them than it spends on its public library system. The costs have been skyrocketing for New York City: in 1978 it paid $24 million; in 1984 it paid $84 million; in 1994 it paid $262 million.

Municipalities are not the only victims. Nonprofit organizations are also sorely hurt. For example, the Cincinnati Symphony Orchestra was dragged into a suit when a drunk driver who was speeding on its exit ramp ran into another driver. The orchestra, obviously, was not at fault, but it was sued because it, unlike the drunk driver, was insured. The willingness to find fault with whoever has money has made it difficult for nonprofit organizations to get insurance. A few years ago the Junior League of Evanston, Illinois, found this fact out when it tried to start a shelter for battered women, only to learn that it could not obtain insurance until after it managed to run the shelter for a minimum of three years without being sued.

Those nonprofit organizations that can obtain insurance have seen their costs skyrocket. Cases in point are provided by Little League Baseball and the Girl Scouts. Creighton Hale, chief executive officer of Little League Baseball, wrote in a February 13, 1995 Wall Street Journal article that Little League Baseball's liability insurance had risen 1000 percent in a recent five year period. That rise in costs was due to such cases as the woman who sued after being struck by a baseball (which her daughter had failed to catch) and the two players who sued their coach after they collided while trying to catch a ball. Similarly, Jan A. Verhage, executive director of the Girl Scouts Council of the Nations Capital, wrote the following: "Locally we must sell 87,000 boxes of these Girl Scout cookies each year to pay for liability insurance. We have no diving boards at our camps. We will never own horses, and many local schools will no longer provide meeting space for our volunteers."

Businesses are also subject to unfair suits, and, even when they win, they lose because of the costs of defending themselves. A small company in Kentucky, Hunt Tractor, has learned this lesson. In recent years, Hunt Tractor has faced two unjust suits, both of which were dismissed, but which cost it $100,000 to defend against. Some cases involve enormous judgments. For instance, Domino's Pizza was ordered to pay $1 million in compensatory damages in a suit involving one of its drivers, and then was ordered to pay an additional $78 million in punitive damages. Not to be outdone, a judge assessed $108.9 million in punitive damages in a Blockbuster Video case. In that case, the plaintiff was an original investor who alleged he had not been properly informed when the general partner sold his franchises. Actual damages plus interest in that case totalled only $14.7 million.

The costs of outrageous judgments, of course, are inevitably passed on to consumers. For instance, in *Gallant* v. *Prudential*, a couple sued that the value of a life insurance policy they had purchased had been misrepresented to them by their agent. Within two weeks the company offered to refund their money or to adjust their policy's terms. Instead, the Gallants sued. Though the face value of their policy was only $25,000, an Alabama jury awarded $30,000 for economic losses, $400,000 for "mental anguish," and $25 million in punitive damages. If this Alabama verdict survives appeal, it will reduce dividends to every Alabaman policyholder by $323. Further, considering that Prudential makes only $46 on a $25,000 policy over its life, it is unlikely that it will continue issuing these low-profit policies. If such damage awards are allowed to continue, it will soon be impossible for low-income people to buy life insurance.

Though the data is incomplete, most studies show that there has been a sharp increase in the number of punitive damage awards. According to an April 3 article in Investors Business Daily, the average inflation-adjusted damage award increased 1,595 percent between 1965 and 1984. Some States have done more than their fair share to raise this percentage. For instance, Professor George Priest of Yale Law School reports that 65 percent to 78 percent of all tort actions over the last fiscal year in three counties in Alabama included punitive damages in the pleadings. What was originally intended to be a very rarely used remedy has now become the norm in Alabama.

Those Senators who have said that there has not been any growth in the number of punitive damage awards in America have

leaned heavily on a single study by a trial lawyer, Johnathan Massey, which they commissioned. Their claim from this study is that there have been only 375 punitive damage awards in product liability cases between 1965 and 1990. However, they ignore the disclaimer in their study that "The actual number of punitive damage awards in product liability litigation is unknown and possibly unknowable because no comprehensible reporting system exists." They also ignore testimony in the Judiciary Committee by Victor Schwartz that found 411 product liability punitive damage verdicts in just 5 States since 1990. Punitive damage verdicts are certainly more frequent than opponents of this measure are willing to admit. The frequency of punitive damage awards is irrelevant, however. The proposition advanced by the Dole amendment is that the threat and actuality of enormous punitive awards is unfair to manufacturers, nonprofit organizations, governments, businesses, and consumers. The only ones who benefit are the trial lawyers who take their 30, 40, or 50 percent of the awards.

In the opinion of many Senators, awarding punitive damages in any civil proceeding violates fundamental principles of due process. In our society, punishment by the Government is traditionally reserved for the criminal code, which carries with it protections against self-incrimination, a requirement that the prosecution prove its case beyond a reasonable doubt, explicit statutory definitions of the appropriate punishments for different crimes, and similar protections. Under the civil code, none of these protections apply, though the punishments are often more severe. For this reason, many Senators would be much happier to do away with punitive damages altogether, as five States have already done with no ill effects for consumers. Under the mild limits of the Dole amendment, punitive damages of nearly $30 million could still have been awarded in the above-mentioned Blockbuster Video case. Such an award does not strike us as an extreme limitation.

The Dole amendment is the first major amendment before the Senate to expand the scope of this bill to encompass full civil liability reform. The House has already adopted a similar measure; we hope the Senate has the courage to follow suit.

Those opposing the Dole amendment contended:

Argument 1:

The Dole amendment would extend the reach of this bill to limit the award of punitive damages in all civil actions involving interstate commerce. Because of the willingness of Congress and the courts to stretch the limits of the commerce clause of the Constitution, this extension would result in caps in nearly every civil trial, both State and Federal, in America. We strongly oppose the caps that are in this amendment.

Under the Dole amendment, defendants could demand a separate proceeding to determine if punitive damages should be awarded. If such a proceeding were demanded, evidence of punitive misconduct could not be introduced in proceedings on compensatory damages. When this provision is combined with the bill provision (which is repeated in the Dole amendment) which states that noneconomic damages (pain and suffering) may be awarded on a several basis only, two problems arise. First, it becomes difficult to assign several liability for noneconomic damages. For example, assume that a truck with defective brakes and a drunk driver struck and killed a pedestrian, and assume the company that owned the truck knew that the driver had four drunk driving convictions. In this case, negligence could be proven for determining compensatory damages, but gross negligence could not, because facts related to the drunkenness would be reserved for the punitive trial phase. As a result, the company making the brakes could be mistakenly assigned too great a share of the several liability for compensatory damages. The next problem is that punitive damages would be capped based on the noneconomic losses for which a defendant was responsible. In the above example, if punitive misconduct were proven in the second proceeding, the award would be limited by the earlier, too low determination of several liability from the compensatory damage proceeding.

The underlying premise of this amendment is that juries cannot be trusted to award reasonable punitive damage awards. The evidence does not support this premise. Tort cases comprise only a small portion, 9 percent, of all civil litigation. Within that percent, only a small portion of cases involve punitive damages. For example, a study done of product liability cases at our behest by Johnathan Massey, an attorney with extensive experience in product liability cases, found that punitive damage awards were given for defective products a mere 375 times since 1965. Punitive damage awards are meant to be used as a remedy in only the most extreme of circumstances, and the few times that they have been proves that juries understand this fact.

To further support our position, we turn our colleagues attention to some of the cases in which punitive damages have been awarded. In *Harless* v. *Boyle-Midway Division of American Home Products*, the manufacturer of PAM, a non-stick cooking spray, was ordered to pay punitive damage because it had failed to strengthen its warning label on its product even after numerous people died after concentrating and inhaling the spray. After paying a $1.25 settlement, the company finally improved its warning label. Similarly, it took a wrongful death judgment to get the Boyle-Midway company to improve its warning label on its Old English furniture polish (in that case, an infant died after accidently ingesting polish). The point of these examples is both that punitive damage suits work in forcing companies to reform, and that cases exist in which companies clearly deserve to be punished for their actions, even if they technically have not broken any laws.

The Dole amendment is extreme. It would run roughshod over States' rights in all civil cases and would put consumers at risk in its effort to protect guilty parties from receiving the punishment they deserve. Clearly this amendment should be defeated.

Argument 2:

While recognizing that a very impressive array of organizations, including municipalities, small businesses, and nonprofit groups, strongly support curbing all the costs and problems from punitive damages that are associated with our legal system, not just those costs and problems associated with product liability cases, we cannot support this amendment. Agreeing to it would lessen support among certain Senators for this bill, and, without their votes, we will be unable to invoke cloture and ultimately pass it. Therefore, without even commenting on the merits of the Dole amendment, we urge our colleagues to defeat it.